United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig w/ affidavit of mailing

76-1055

To be argued by
CHARLES E. CLAYMAN

B
Pgs

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1055

UNITED STATES OF AMERICA,

Appellee,

—*against*—

SUAT C. TORUN,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
CHARLES E. CLAYMAN,
Assistant United States Attorneys,
Of Counsel.

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BRIEF FOR THE APPELLEE

Preliminary Statement and Statement of the Case

Suat C. Torun appeals from a judgment of conviction upon his plea of guilty on October 25, 1975, before the Honorable John R. Bartels, to an information charging him with possession of cocaine in violation of Title 21, United States Code, Section 844(a). On December 19, 1975, appellant was sentenced by Judge Bartels to the custody of the Attorney General under the Provisions of the Youth Corrections Act ("Y.C.A."), Title 18, United States Code, § 5010(b). Appellant is presently incarcerated.

On this appeal appellant attacks the sentence imposed by the court as both an abuse of discretion and violative of due process.

ARGUMENT

POINT I

The sentence of the District Court was proper and is not subject to appellate review.

"Review [of] a sentence imposed by a district judge is extremely limited", *United States* v. *Holder*, 412 F.2d 212, 214 (2d Cir. 1969). Absent a manifest abuse of discretion, the sentence will not be subject to review so long as it is within statutory limits. *United States* v. *Sohnen*, 280 F.2d 109 (2d Cir. 1960). See also *United States ex rel. Frasier* v. *Casscles*, — F.2d — Docket No. 75-2142 (2d Cir., Decided Feb. 18, 1976), slip op. 2001, 2004. The sentence in the instant case was clearly within statutory limits and was not an abuse of discretion.

Appellant's reliance upon *United States* v. *Hartford*, 489 F.2d 652 (5th Cir. 1973), is misplaced. The Court in *Hartford* reasoned that the District Court Judge had "employed YCA in a manner repugnant to the ameliorative congressional purpose underlying the statute, namely to allow correctional rehabilitation for youthful offenders, not to mete out retributive punishment". *Id.* at 654.

In the instant case Judge Bartels explained to appellant that he was sentencing him under YCA so that he would be given the opportunity to rehabilitate himself. The Court stated "It is an elastic sentence and all depends on him". (Appellant's Appendix, pp. 8-9.) Simply put, the sentence imposed was designed by the District Court Judge to work for the best interests of the appel-

lant by electing rehabilitation over retribution.[1] Finally, Judge Bartel's comment about "revolving door" justice in the New York Criminal Court, highlighted by appellant (Brief p.5) was immediately followed by the Judge's comment: "[It] has nothing at all to do with my decision." (Appellant's Appendix, p. 6).

POINT II

Appellant's sentence was not constitutionally defective.

Appellant contends that his sentence under 18 U.S.C. § 5010(b) violated due process and the equal protection of the law because it involved a potentially longer period of incarceration than he would have received had he been sentenced to the maximum prison term allowed under § 844(a); to wit, one year. This contention, however, has previously been rejected by this Court and others which have considered it. See *United States* v. *Dancis*, 406 F.2d 729 (2d Cir.), *cert. denied*, 394 U.S. 1019 (1969); cf. *United States ex rel. Sero* v. *Preiser*, 506 F.2d 1115, 1120 (2d Cir. 1974) and cases cited herein.

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[1] We note, also, that appellant was clearly advised, at the time of the taking of his plea, of both the fact that he might be sentenced under YCA, and the ramifications of such a sentence. Moreover, the court specifically stated.

> "But if you sentence under the Youth Correction Act the time certainly can exceed the time of the regular adult sentence. That is exactly why the youth is told in advance so that if he wishes he may not want to plead guilty and can withdraw his plea.
>
> Do you understand that Mr. Torun?
>
> The Defendant: Yes I do.

(Government's Appendix, p. 12).

CONCLUSION

The judgment of conviction and sentence of appellant should be affirmed.

Dated: April 5, 1976.

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
CHARLES E. CLAYMAN,
Assistant United States Attorneys,
Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 5th day of April, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Headley & Zeitlin, Esqs.
66 Court Street
Brooklyn, N.Y. 11201

Evelyn Cohen

Sworn to before me this
5th day of April, 1976

Notary Public, State of New York
No. 24-0201965
Qualified in Kings County
Commission Expires March 30, 1977